Supreme Court, U.S.
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In the Supreme Court of the United States

CLEVELAND CONSTRUCTION, INC.,
Petitioner,

v.

CITY OF CINCINNATI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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November 3, 2008

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QUESTIONS PRESENTED

1. Whether a state scheme of competitive bidding that contains substantive limitations and particularized standards which restrict the discretion of the decisionmaker may give rise to a property interest protected by due process.

2. Whether the City of Cincinnati, Ohio could deny Cleveland Construction, Inc., the award of a competitively bid contract for the sole purpose of implementing unconstitutional racial requirements and to achieve unconstitutional racial goals.

LISTING OF THE PARTIES AND CORPORATE DISCLOSURE

The Petitioner is Cleveland Construction, Inc. ("Cleveland"). The Respondent is the City of Cincinnati, Ohio ("the City").

There are no parties to the current proceedings other than those listed in the caption. Petitioner Cleveland has no parent corporation and no publicly-held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cleveland respectfully prays that a writ of certiorari be issued to review the final judgment of the Supreme Court of Ohio.

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS FOR CASE

Cleveland Construction, Inc. v. City of Cincinnati, 118 Ohio St. 3d 283 (2008).

Cleveland Construction, Inc. v. City of Cincinnati, 2008 Ohio 3880, 2008 Ohio LEXIS 2040 (Ohio, August 6, 2008)(reconsideration denied).

Cleveland Construction, Inc. v. City of Cincinnati, 169 Ohio App. 3d 627 (Hamilton Cty. 2006).

JURISDICTION

The Judgment of the Supreme Court of Ohio on the issues accepted for review was entered on May 21, 2008.[1] The Supreme Court of Ohio denied Petitioner's Motion for Reconsideration on August 6, 2008.[2] The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1257(a).

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[1] App. 2a.

[2] App. 1a.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES AT ISSUE

The Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

42 U.S.C. § 1981 provides:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and

to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Cincinnati Municipal Code § 321-1-B provides:

Best Interest of the City.

"Best interest of the city" shall mean any decision made by the city manager or city purchasing agent or their designee that the officer concerned believes a specific bid may be of benefit to the efficiency or effectiveness of the operation of the city. This is a matter of discretion and the decision of the officer concerned is final.

Cincinnati Municipal Code § 321-1-M provides:

> May.
>
> "May" denotes the permissive.

Cincinnati Municipal Code § 321-43 provides:

> Bid; Rejection of Bids.
>
> The city purchasing agent, city manager or any other duly authorized contracting officer may reject any bid for any reason or all bids for no reason if acceptance of the lowest and best bid is not in the best interests of the city.

Cincinnati Municipal Code Section 323-13 provides:

> Sec. 323-13. Appeal.
>
> (a) Noncompliance and denial of certification. Upon a determination of noncompliance with the requirements of this chapter or a denial of certification as an SBE by the contract compliance officer, the contract compliance officer shall notify the affected party in writing by certified mail, setting forth the reasons for the determination of noncompliance or denial of certification.
>
> (b) Time for Filing Notice of Appeal. Any contractor, bidder or offeror who has been denied certification as an SBE or against whom a determination of noncompliance with the requirements of this chapter has been found by

the contract compliance officer may appeal the determination of noncompliance or denial of certification by filing a notice of appeal with the director of OCC in writing within seven (7) days of receipt of the notice of the determination of noncompliance or denial of certification.

(c) Notice of Hearing Date and Hearing. Upon receipt of the notice of appeal from the aggrieved party by the contract compliance officer of OCC, the OCC within three (3) working days of receipt of the notice, shall forward the notice to the contract compliance advisory board.

(d) Contract Compliance Advisory Board. The city manager shall structure a contract compliance advisory board of the city to include; representatives of the city, labor, SBEs, and citizens. The board shall make recommendations to the city manager for appeals. Board members shall serve for a period of two years. The decision of the city manager or the city manager's designee, for appeals shall be final.

The board shall set a hearing date not more than twenty-eight (28) days from the date of receipt of the notice from the contract compliance officer. The board shall cause notice of the hearing to be served upon all parties, by certified mail. Such notice shall set forth with particularity the charges filed by the aggrieved business and shall include the hearing date, time, and place. At the hearing, all parties shall

be provided a fair and impartial hearing and shall be allowed to produce any and all evidence in either party's possession concerning the determination of noncompliance with the requirements of this chapter.

(e) Decision. The board shall, within seven (7) days of the conclusion of the hearing, make a written recommendation to the city manager or the city manager's designee on the appeal, which recommendation shall affirm, modify, or reverse the determination of noncompliance or the denial of certification by the board. The board shall decide whether the determination of noncompliance being appealed was in accordance with the law and the terms and conditions of the solicitation before the contract is awarded or penalties are imposed, except in emergency situations as determined by the city purchasing agent. If the city manager finds for the aggrieved party, the business shall be certified as an SBE and added to the certification maintained by the city or the business shall be found in compliance with the requirements of this chapter and permitted to submit a bid or proposal in response to the city's solicitation. The decision of the city manager or the city manager's designee shall be final, subject to the right of appeal as provided by law.

(f) Notice of Decision. The city manager shall issue written notice if the decision on the appeal to all parties after receiving the recommendation of the board. The notice of the decision shall be sent to all parties by certified

mail and shall set forth the reasons for the decision.

Cincinnati Municipal Code § 321-37. (App. 132a.)

STATEMENT OF THE CASE

Cleveland was the lowest bidder for the drywall contract on the Cincinnati Convention Center Expansion and Renovation Project, ("the project").[3] Bidders on the project were subject to the City's Small Business Enterprise ("SBE") program.[4] The City's SBE program required "subcontracting outreach" of all bidders.[5] Bidders had to subcontract a certain percentage of their contract to "small businesses," and in doing so, the bidders were required to make a "good faith effort" to "obtain the maximum practicable participation by small, minority and women–owned business enterprises" in the subcontracted portion of their bid.[6] Prior to submitting bids, the bidders were given an "Availability Estimation" by the City which estimated the availability of minority and women drywall subcontractors in relation to the percentage in which the City indicated they should be reflected in the subcontracted portion of a bidder's bid.[7] Bidders

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[3] App. 67a.

[4] *Id.*; and 182a.

[5] App. 67a-68a.

[6] App. 67a-68a; 81a-84a; 135a-139a; 163a-176a.

[7] App. 135a.

were told by the City in a summary of the subcontracting requirements that: "Bidders should be able to include minority and female firms at the level of availability indicated," and that the City expected "the utilization of SBEs to be reflective of the availability estimates."[8] The City admitted that it lacked any factual predicate that could satisfy "strict scrutiny" review of a race-conscious program, but claimed that the SBE program was race-neutral.[9]

The sole reason Cleveland was not awarded the contract is that it did not meet the 35% subcontracting requirement.[10] Instead, Valley Interior Systems, Inc., ("Valley"), was awarded the contract because it met (and in fact exceeded) the 35% subcontracting requirement, although Valley's bid was 1.2 Million Dollars higher in price than Cleveland's.[11] All of Valley's small business enterprise subcontractors were also minority business enterprises.

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[8] App. 85a; 136a.

[9] App. 78a.

[10] App. 67a-68a. Cleveland was not informed by the City that it would not be awarded the contract in advance of the City making an award to another bidder.

[11] *Id.* A third bidder, Kite, was higher in price than Valley but also met the subcontracting requirement of the SBE program.

The basis for Cleveland's claimed violation of its constitutional procedural due process rights[12] is that the City had no discretion under the City code to award to any bidder other than Cleveland if it awarded the contract on the basis of the bidders meeting the subcontracting requirement of the SBE program.[13] The City was restricted by its code (Cincinnati Municipal Code § 321-37(c)(4)) from awarding the contract to a bidder higher in price by more than 10% or $50,000.00 than the lowest bidder if the basis for the award was to be that bidder's compliance with the subcontracting outreach requirement of the SBE program.[14] Although the City in fact awarded the contract to Valley because Valley met the subcontracting requirements of the SBE program, the City did not apply the restriction of Cincinnati Municipal Code § 321-37(c)(4) in making the award.

Cleveland filed suit on March 30, 2004 when it learned of the contract award to Valley, alleging violation of its constitutional rights to due process and equal protection under 42 U.S.C. § 1983, as well as

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[12] Cleveland was successful in proving a violation of its equal protection rights at trial and obtained prospective injunctive relief to prevent the City from applying the race conscious provisions of its SBE program in the future.

[13] The federal statutory and constitutional issues of whether Cleveland can pursue a damage remedy (for lost profits) under 42 U.S.C. § 1983 for violation of its constitutional rights to equal protection and due process have been raised at every stage of this case.

[14] App. 132a-134a.

under state law for the City's abuse of discretion in violating its own code restriction, Cincinnati Municipal Code § 321-37(c)(4).[15] Cleveland requested money damages, declaratory judgment, and temporary, preliminary and permanent injunctive relief. At the same time, Cleveland filed a motion for a temporary restraining order. The trial court denied the request for a temporary restraining order.[16] The court set the case for a hearing on Cleveland's request for a preliminary injunction, but the City filed a Notice of Removal to federal court. The case was removed improperly and eventually was remanded.[17]

The City and Valley each filed motions to dismiss Cleveland's amended complaint. The trial court denied the motions to dismiss as to the City and Valley, but granted dismissal of the claims against the individual City employee defendants.[18] The parties agreed that a hearing on Cleveland's request for preliminary injunctive relief would be combined with a trial on the merits.[19] All parties filed cross motions for summary judgment. Cleveland combined with its motion for summary judgment a request for a permanent injunction, or in the alternative, preliminary injunctive

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[15] App. 103a.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] App. 66a; 101a.

relief. The cross-motions for summary judgment and Cleveland's requests for injunctive relief were denied.[20]

After Cleveland presented its case to a jury, the trial court directed a verdict against Cleveland on its damage claims,[21] leaving claims for declaratory and

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[20] App. 102a *et seq*.

[21] App. 99a; 85a-88a; 93a-94a. The trial court directed a verdict on damages because it found that in Ohio, money damages against a city under 42 U.S.C. § 1983 for either a due process violation or an equal protection violation arising from a competitive bidding scenario are only available to the extent that injunctive relief is unavailable as a remedy. Because the court found Cleveland had not carried its burden of proof as to its request to enjoin construction of the then ongoing project by failing to prove the degree of completion of the drywall portion of the project in its case-in-chief, the court found that Cleveland was not entitled to damages. The court relied upon a recent decision from the Supreme Court of Ohio, *Cementech v. City of Fairlawn*, 109 Ohio St.3d 475, 849 N.E.2d 24 (2006). The holding of *Cementech*, which did not involve a claim under 42 U.S.C. § 1983, was that a disappointed bidder on a competitively bid contract who proves an abuse of discretion under Ohio law does not have a damage remedy, but only a remedy of injunctive relief. The Ohio First District Court of Appeals reversed the decision of the trial court, finding that 42 U.S.C. § 1983 contains no such limitation and remanded for a trial on damages. (App. 50a) The City's appeal of this case to the Supreme Court of Ohio followed. Although the Supreme Court of Ohio analyzed Cleveland's due process claim differently than the trial court, it appears that the Supreme Court of Ohio likewise attempted to mold this Court's constitutional due process property law jurisprudence concerning when a "legitimate entitlement" arises to fit its holding in *Cementech*. As argued herein, that attempt is misguided and is an incorrect application of this Court's prior holdings, as well as the holdings of the Sixth

injunctive relief and attorneys fees for decision by the court. The trial court found in favor of Cleveland on its claims for violation of the Fourteenth Amendment Equal Protection and Due Process Clauses, and corresponding violations of 42 U.S.C. § 1983.[22] The trial court awarded declaratory relief as to those findings, and issued prospective permanent injunctive relief against the City's use of the unconstitutional race-conscious parts of its SBE Program, which it found encouraged and pressured bidders to racially discriminate in the selection of subcontractors. The court also found Cleveland to be a prevailing party entitled to its attorney's fees and costs under 42 U.S.C. § 1988.[23] Cleveland filed a Motion for New Trial, which was denied.[24] Cleveland appealed the trial court's final judgment relating to the directed verdict on damages, and the City filed a cross-appeal. The Ohio First District Court of Appeals consolidated the appeals.

The Ohio First District Court of Appeals reversed the trial court's directed verdict on Cleveland's damage claims arising from equal protection and due process violations under 42 U.S.C. § 1983, and upheld the findings that the City violated Cleveland's rights to

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Circuit Court of Appeals applying the decisions of this Court in the context of challenges to the award of competitively bid contracts.

[22] App. 66a *et seq.* and 60a *et seq.*

[23] *Id.*

[24] App. 58a.

equal protection and due process and Cleveland's entitlement to attorney fees under 42 U.S.C. § 1988.[25]

The City filed a discretionary appeal to the Supreme Court of Ohio. The Supreme Court of Ohio accepted two of five issues presented for review by the City and declined to exercise jurisdiction over the lower courts' determinations on Cleveland's equal protection claims.[26] The two issues accepted for review were: (1) "Under Ohio law, a disappointed bidder for a City of Cincinnati public contract does not have a constitutionally protected property interest in that contract;" and (2) "A disappointed bidder for a public contract in Ohio cannot recover lost-profit damages in a 42 U.S.C. 1983 action alleging a deprivation of procedural due process."[27]

The Supreme Court of Ohio reversed in a decision issued on May 21, 2008, holding in its syllabus that:

> No property interest is created when a City properly exercises its discretion and does not award a contract to a party deemed not to have complied with the requirements of the invitation to bid.[28]

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[25] App. 27a; 25a.

[26] App. 15a; 17a; 19a; 184a.

[27] App. 17a.

[28] App. 2a.

The Court did not reject the finding of the trial court nor of the Ohio First District Court of Appeals that the monetary cap restriction of Cincinnati Municipal Code § 321-37(c)(4) was applicable to the contract award and was not discretionary in its application, but instead found it did not need to address the applicability of the code restriction:

> Nevertheless, it is unnecessary for us to resolve the question of which interpretation is correct in order to determine whether Cleveland Construction had a property interest in the drywall contract. Even if we were to accept the First District's conclusion that Cincinnati Municipal Code 321-37(c)(4) limits the city's discretion to award a contract to a higher bidder when the award is made based upon SBE considerations, that conclusion does not mean that the city must award the contract to the lowest bidder, which in this case is Cleveland Construction.[29]

Cleveland's Motion for Reconsideration was denied by the Supreme Court of Ohio on August 6, 2008.[30]

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Ohio sets a dangerous precedent, and one that is at odds with the constitutional jurisprudence of this Court delineating

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[29] App. 8a-9a.

[30] App. 1a.

when property interests protected by due process arise. It is also at odds with decisions of the Sixth Circuit Court of Appeals extrapolating these constitutional principles in new contexts, here the realm of public competitive bidding. The decision of the Supreme Court of Ohio is wrong for two reasons.

First, it has allowed the City to spurn a clear substantive limitation on its discretion within its code, a limitation which contains a particularized numerical standard, which required that if the City were to proceed with an award of the drywall contract on the basis it chose, it could only award it to Cleveland. The Supreme Court of Ohio erroneously focused upon whether an abuse of discretion under local law existed, and ignored application of the constitutional principles enunciated by this Court and the Sixth Circuit. The decision amounts to a *per se* rule that where a state legislative scheme of competitively awarding public contracts provides for the discretion to reject bids for any reason, even where the discretion to award is substantively limited by particularized, fixed criteria and rules, no property interest protected by due process can ever arise.

Second, the decision of the Supreme Court of Ohio gives free rein to municipalities to exercise the discretion inherent in the competitive bidding process for the purpose of implementing and achieving illegal and unconstitutional requirements and goals; requirements and goals which in this case violated both the Fourteenth Amendment's Equal Protection Clause and 42 U.S.C. § 1981. That is not a "proper exercise of discretion" created by law in a "lowest and

best" contract award process, but is instead in and of itself a violation of constitutional due process.

I. The Decision of the Supreme Court of Ohio Conflicts With Constitutional Principles Established by this Court and with Decisions of the Sixth Circuit Court of Appeals Which Govern the Determination of Property Interests Protected by Due Process.

A. The Determination of Whether a Substantive Interest Created by State Law Rises to the Level of a Property Interest Protected by Due Process is a Question of Federal Constitutional Law.

This Court need not defer to the Supreme Court of Ohio's legal conclusion that the local City ordinance at issue did not give rise to the existence in Cleveland of a property interest in the drywall contract. "Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause."[31] "Resolution of the federal issue begins, however, with a determination of what it is that state law provides."[32] This Court is the final authority as to the

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[31] *Memphis Light v. Craft*, 436 U.S. 1, 9 (1978), (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 602 (1972)).

[32] *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 757 (2005).

constitutional implications of the legal scheme of awarding contracts devised by the City as it applies in this case, and can proceed to its own analysis of whether the City's code gave rise to a legitimate entitlement in Cleveland that, if the City proceeded to make an award of the drywall contract under the circumstances that it did, the award was required to be made to Cleveland.[33]

B. A State Scheme of Distribution of Benefits May Give Rise to a Property Interest Protected by Due Process If Substantive Limitations and Particularized Standards Restrict the Discretion of the Decision Maker.

This Court's pronouncement in *Board of Regents v. Roth*[34] must be the starting point in any analysis of whether a property interest subject to due process protection under the Fourteenth Amendment has been created. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead, have a legitimate claim of entitlement to it."[35] "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or

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[33] *Id.* at 758.

[34] *Board of Regents v. Roth*, 408 U.S. 564 (1972).

[35] *Id.* at 577.

understandings that secure certain benefits and that support claims of entitlement to those benefits."[36] In the course of analyzing the wide range of interests which are subject to due process protection, this Court has stated that they are so broad as to "relate to the whole domain of social and economic fact."[37]

The requirement of *Roth* that a person have a legitimate claim of entitlement to which he alleges due process protection attaches necessarily leads to the conclusion that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion."[38] *Greenholtz v. Nebraska Penal Inmates*[39] raised this issue in the context of determining whether a protected liberty interest exists under the Nebraska parole release statute. This Court held that the statute did create a liberty interest subject to protection under the Due Process Clause because it contained mandatory language controlling the discretion of a parole board under the facts at issue in the case. In a subsequent case, *Board of Pardons v. Allen*, this Court discussed how a statutory scheme of distributing benefits which, although discretionary,

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[36] *Id.*

[37] *Id.* at 571-572 (citing to *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 646 (1949)).

[38] *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (citing *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 462-463 (1989)).

[39] 442 U.S. 1 (1979).

can still be compatible with the creation of a legitimate entitlement protected by the Due Process Clause:

> The Court thus held in *Greenholtz* that the presence of general or broad release criteria—delegating significant discretion to the decisionmaker—did not deprive the prisoner of the liberty interest in parole release created by the Nebraska statute. In essence, the Court made a distinction between two entirely distinct uses of the term discretion. In one sense of the word, an official has discretion when he or she "is simply not bound by standards set by the authority in question." R. Dworkin, Taking Rights Seriously 32 (1977). In this sense, officials who have been told to parole whomever they wish have discretion. In *Greenholtz*, the Court determined that a scheme awarding officials this type of discretion does not create a liberty interest in parole release. But the term discretion may instead signify that "an official must use judgment in applying the standards set him [or her] by authority"; in other words, an official has discretion when the standards set by a statutory or regulatory scheme "cannot be applied mechanically." Dworkin, *supra*, at 31, 32; see also id., at 69 ("We say that a man has discretion if his duty is defined by standards that reasonable [people] can interpret in different ways"). The Court determined in *Greenholtz* that the presence of official discretion in this sense is not incompatible with the existence of a liberty interest in parole release when release is required after the Board

determines (in its broad discretion) that the necessary prerequisites exist.[40]

The Sixth Circuit Court of Appeals has applied these constitutional principles in the public competitive bidding context where a bidder who is not awarded a contract alleges a deprivation of constitutional due process. In *United of Omaha Life Ins. Co. v. Solomon*,[41] the court rejected such a claim, holding that "a 'disappointed bidder' to a government contract may establish a legitimate claim of entitlement protected by due process by showing either that it was actually awarded the contract at any procedural stage or that local rules limited the discretion of state officials as to whom the contract should be awarded."[42]

United of Omaha had provided administration of life insurance benefits to employees of the state of Michigan for 30 years under a state contract.[43] Michigan put the contract out to bid and (as is typical in competitive bidding processes) reserved the right to reject all bids and to rebid the contract.[44] There were

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[40] *Board of Pardons v. Allen*, 482 U.S. 369, 375-376 (1987).

[41] 960 F.2d 31 (6th Cir. 1992).

[42] *Id.* at 34 (citing to *Peterson Enter., Inc. v. Ohio Dep't of Mental Retardation and Developmental Disabilities*, 890 F.2d 416 (6th Cir. 1989)(unpublished opinion)).

[43] *Id.* at 33.

[44] *Id.*

purchasing guidelines for the state in its Vendor's Guide which required protests directed to the bid specifications to be made at least seven days prior to the bid due date, and which stated that the office of purchasing would not withdraw a recommendation to award or re-evaluate bids when an appeal was directed to the bid specifications being too restrictive or alleged that a bid exceeding specifications provided a better value than a lower bid meeting specifications.[45] Royal Maccabees Life Insurance Company submitted a bid which was originally not opened because it was deemed not to comply with the bid specifications.[46] After two compliant bids were opened (one of which was United of Omaha's), it was found that United of Omaha was the low bidder, and a recommendation was made to award the contract to United of Omaha.[47] Maccabee appealed before the award of the contract, arguing it had met the specifications or, in the alternative, that the specifications were too stringent.[48] Michigan agreed, and decided to rebid the contract.[49] United of Omaha filed suit alleging violation of the Vendor's Guide, which it argued created a protected property interest (as well as a

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[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

liberty interest) in United of Omaha.[50] The Sixth Circuit disagreed with United of Omaha, finding that the Vendor's Guide created nothing but procedural rights, and that "courts generally agree that no property interest exists in a procedure itself, without more."[51] There were no substantive restrictions or particularized standards in the Vendor's Guide which compelled the contract award, if made, to go to United of Omaha, and no property interest could have been created by only a process which was not followed.

The *United of Omaha* case is a perfect illustration of a decision which correctly applies the principles enunciated by this Court which, although relied upon by the City below, presents a set of facts completely different than the facts in this case. Michigan's Vendor's Guide did not control the substantive result or to whom the contract award must be made by imposition of any particularized standards. Michigan was basically free to award to the contractor it decided best fit its needs, with no substantive restrictions. Michigan's failure to follow the processes set forth in its Vendor's Guide could not equate to a constitutional violation of due process because that discretionary scheme did not contain substantive restrictions compelling a particular result to any particular bidder. Whether the failure of Michigan to follow its own Vendor's Guide procedures would constitute an abuse of discretion under Michigan's competitive bidding law

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[50] *Id.*

[51] *Id.* at 34 (quoting *Curtis Ambulance of Florida, Inc. v. Board of County Comm'rs,* 811 F.2d 1371, 1377 (10th Cir. 1987)).

was simply not relevant to the determination of whether a constitutional property interest existed, because there were no substantive restrictions or particularized standards in those procedures that compelled any particular result. While a court applying Michigan competitive bidding law might find such a procedural transgression subject to injunction to protect the public interest in the integrity and efficacy of the competitive bidding process, no property interest could have been at stake in United of Omaha.

In this regard, the *United of Omaha* case is analogous to the Supreme Court of Ohio's decision in the case of *Cementech v. City of Fairlawn*[52] where the Court held that as a matter of Ohio law, a disappointed bidder can never recover lost profits as damages in the competitive bidding context. No property interest was claimed by the plaintiff in *Cementech,* and there was no claim under 42 U.S.C. § 1983. In fact, such a claim would have failed. This is because while the disappointed bidder in *Cementech* did prove an abuse of discretion by the city, the discretionary legislative scheme in that case did not contain particularized, substantive standards which compelled any particular result. The abuse of discretion was simply that the law director lacked the legal authority to reject the plaintiff's bid. That is unlike the result compelled by the City's code here, which by application of the restriction of Cincinnati Municipal Code § 321-37(c)(4) excluded all bidders other than Cleveland because the City admittedly proceeded to make the contract award based upon the

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[52] 109 Ohio St. 3d 475 (2006).

bidder's compliance with the subcontracting requirement of the SBE program, making compliance with the SBE Program's subcontracting requirement the paramount concern in awarding contracts on the project. The City in the present case was bound by a particularized standard and a substantive restriction in its own code—Cincinnati Municipal Code § 321-37(c)(4)—which was triggered by the City's basis for the award.

Interestingly, the Sixth Circuit in *United of Omaha* distinguished the Michigan competitive bidding statute from the statute of another state, Georgia, which provided that contract awards must be made to the lowest responsible bidder, which made the case *Pataula Electric Membership Corp. v. Whitworth,*[53] where a protected property interest was found to exist, distinguishable from the *United of Omaha* facts. While the City continuously attempts to characterize its competitive bidding scheme as a completely discretionary "lowest and best" scheme, it clearly is not a purely "lowest and best" scheme. When the City enacted Cincinnati Municipal Code § 321-37(c)(4), it made its competitive bidding scheme one that requires award to the *lowest* bidder where, as here, it seeks to award a contract to a bidder whom it has selected for the purpose of allowing the City to achieve its required subcontracting percentage goals, and the price differential between the bidders who met the subcontracting requirement and the lowest bidder who did not meet those goals, is too great. That was exactly the situation here, and the City's choice to go forward

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[53] 951 F.2d 1238 (11th Cir. 1992).

with a contract award on the basis of compliance with the subcontracting requirement of the SBE program after it had eliminated all other considerations made Cleveland the only bidder eligible for that award under Cincinnati Municipal Code § 321-37(c)(4).

In the Sixth Circuit's most recent case to address the issue of constitutionally protected property rights in the competitive bidding context, again the distinction between mere process and process that contains substantive restrictions was made. In *Experimental Holdings, Inc. v. Farris*[54] the Sixth Circuit explained:

> Indeed, if state law *procedural* protections were sufficient to create federally protected property interests, then every state law procedural violation would be a potential federal case. This case, for instance, appears to revolve entirely around the content of Kentucky law concerning government bidding. Federal law is hardly cited by the parties, and the mere words "abuse of discretion" are not sufficient to turn a state procedural violation into a federal due process case. Otherwise, most state review-of-administrative-action cases would be potential federal cases.[55]

In *Experimental Holdings,* the Sixth Circuit directly relied upon one of this Court's decisions in the area of

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[54] 503 F.3d 514 (6th Cir 2007).

[55] *Id.* at 520.

prisoner rights, *Olim v. Wakinekona,* which made clear the distinction between an interest in process and substantive interests, emphasizing that no property interest can exist in a process alone:

> Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.[56]

In *Olim*, this Court also stated:

> These cases demonstrate that a State creates a protected liberty interest by placing substantive limitations on official discretion. An inmate must show "that particularized standards or criteria guide the State's decisionmakers." If the decisionmaker is not "required to base its decisions on objective and defined criteria," but instead "can deny the requested relief for any constitutionally permissible reason or for no reason at all, the State has not created a constitutionally protected liberty interest"[57]

The concern of the Sixth Circuit in *Experimental Holdings* is equally applicable to the decision of the Supreme Court of Ohio in this case. Here, the holding of the Supreme Court of Ohio incorrectly focused solely on whether there was an abuse of discretion under Cincinnati's competitive bidding law, and whether the

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[56] *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983).

[57] *Id.* at 249. (internal citation omitted).

City appropriately rejected Cleveland because it was "deemed not to have complied with the requirements of the invitation to bid."[58] The Supreme Court of Ohio's holding misses the focus of the proper constitutional analysis. Every abuse of discretion under a state law competitive bidding scheme is not a violation of a constitutionally protected property right. The focus for purposes of the constitutional property rights analysis should have been on whether the limits on discretion in the competitive bidding ordinance were substantive or merely procedural. The Supreme Court of Ohio failed to provide the proper emphasis that federal constitutional law requires be placed upon the substantive restriction imposed upon the City's discretion by Cincinnati Municipal Code § 321-37(c)(4).

Ironically, the Supreme Court of Ohio found it unnecessary to even review the First District Court of Appeal's (and the trial court's) interpretation and application of Cincinnati Municipal Code § 321-37(c)(4), which both of the lower courts found to be a substantive limitation upon the City's discretion under its competitive bidding ordinance, one which compelled that the drywall contract be awarded to Cleveland.[59] Cincinnati Municipal Code § 321-37(c)(4) was the one particularized, substantive restriction on discretion contained in Cincinnati's competitive bidding scheme which gave rise to the entire constitutional claim of a due process violation in this case, and it prohibited the City from awarding to any bidder for reason of

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[58] App. 2a-3a.

[59] App.8a-9a.

compliance with the subcontracting requirement because both SBE compliant bidders were too high in price, leaving only Cleveland as an acceptable bidder should the City proceed to award the contract. The Supreme Court of Ohio left the lower court's holding that Cincinnati Municipal Code § 321-37(c)(4) was a substantive restriction on discretion untouched, but then proceeded to ignore its constitutional import.

The fact that the conclusion that only Cleveland could have been awarded the contract is reached by a process of exclusion of the other bidders under Cincinnati Municipal Code § 321-37(c)(4) should not matter. The City made it clear it was making the subcontracting percentage of the SBE program the overriding concern in its award of contracts, and that failure to meet the subcontracting percentage was the sole reason Cleveland was not awarded the drywall contract.[60] Cleveland's bid was acceptable in every other way.

Once the City determined that (a) it was going to award a contract based upon the bids it had received, and (b) it wanted to award to a bidder who met the subcontracting requirement of the SBE program, then the City's discretion was limited and the City could not award to Valley or Kite to obtain the subcontracting percentage goal of the SBE program because their bid prices were too high in relation to Cleveland's lowest bid; and if a contract award was to be made, it would have to be made to Cleveland, the only remaining bidder. The Supreme Court of Ohio read absolute

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[60] App. 67a-68a.

discretion on the part of the City into the fact that the City can "reject all bids for any reason or for no reason,"[61] but ignored the fact that the City's timeframe to do either had come and gone.

This time, the City did not reject all bids and rebid. It accepted all three bids for consideration, including Cleveland's, decided it was going to proceed to award the contract to one of the bidders, and moved forward to award the drywall contract to a bidder who had achieved the percentage subcontracting goal of the SBE program, while ignoring the limitation contained in Cincinnati Municipal Code § 321-37(c)(4). The restriction of Cincinnati Municipal Code § 321-37(c)(4) prohibited the City from awarding to either Valley or Kite because they were too high in price over Cleveland's lowest bid. The simple mathematical restriction of Cincinnati Code § 321-37(c)(4) is exactly the sort of substantive restriction on discretion which gives rise to a property interest protected by due process. As the Sixth Circuit explained in *Experimental Holdings:*

> On the contrary, state *procedural* requirements cannot be the types of "limits on discretion" that are sufficient to find a property interest. In order for limits on discretion to create property interests, they must be *substantive* limits on discretion. There would be a substantive limit on discretion if, for instance, a state could not refuse to renew a certain occupational license unless the licensee overcharged customers. The

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[61] App. 9a.

> fact that the state gives the licensee certain *procedural* rights in determining the substantive right (e.g., an oral hearing, appointed counsel, or two administrative appeals) does not turn those procedural rights into federal due process rights. Nor could it, without simply rendering state procedural law enforceable in federal court. In the given example there is arguably a property interest in not losing the license because the state lacks the discretion to deny renewal if the licensee never overcharged customers.[62]

Although local procedural rights do not give rise to substantive entitlements which amount to protected property interests, this Court has decided that local-law remedies may, however, be "evidence of the State's recognition of a protected interest."[63] The Cincinnati Municipal Code provides an opportunity for an appeal where a determination of noncompliance with the SBE Program is found by the City's staff.[64] The procedure requires the City to immediately notify a bidder of the City's finding and allows an appeal to the "Contract Compliance Advisory Board" and an opportunity for a hearing and decision by the Board "before the contract is awarded or penalties are imposed, except in emergency situations as determined by the city

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[62] *Experimental Holdings, supra*, 503 F.3d at 520.

[63] *Memphis Light v. Craft*, 436 U.S. 1, 11 (1978).

[64] Cincinnati Municipal Code § 323-13.

purchasing agent."[65] As the most fundamental elements of due process, notice and an opportunity to be heard, were never afforded Cleveland prior to the contract award, there was no opportunity for such provisions to be utilized. The existence of these provisions, however, does indicate recognition by the City that a protected constitutional property interest may arise under its competitive bidding process. The Supreme Court of Ohio did not place any relevance on this local-law remedy which recognizes a protected property interest, despite the fact this Court's analysis in *Memphis Light* declared it to be relevant.[66]

Likewise, the Supreme Court of Ohio placed no relevance on the fact that federal statutory and constitutional law prohibit insertion of race-based requirements to discriminate into a requirement that a bidder subcontract a percentage of its contract to small businesses. The Supreme Court of Ohio refused to accept for review the equal protection rulings in this case. This includes the First District Court of Appeal's decision reversing the trial court's granting of a directed verdict on the grounds that Cleveland could not prove causation flowing from the equal protection violations because the City only awarded contracts based upon a bidder's obtaining the small business percentage, and not their success in obtaining any particular percentage of minority subcontractors in their bids. The Supreme Court of Ohio completely divorced the equal protection violations from the due

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[65] *Id.*

[66] *Id.*

process portion of the case, which was error. Even though it did not accept the equal protection issues for review, the Supreme Court of Ohio should not have ignored their implications for the due process challenge. It should be beyond argument that no matter what degree of discretion is vested in the City by its competitive bidding scheme, the City cannot exercise that discretion in order to impose a requirement or obtain a result which violates federal statutory law as well as the United States Constitution, which Petitioner addresses in the section below.

Federal law and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution are also relevant to the property analysis itself. A bidder on a public competitively bid contract certainly has the legitimate entitlement, as a matter of law, that any requirement that it subcontract a portion of its contract to small businesses, and that it racially discriminate in the selection of those small business subcontractors, be declared unenforceable. Such a requirement not only violates the Equal Protection Clause, but also violates federal statutory law contained in 42 U.S.C. § 1981 which prohibits private racial discrimination in contracting. Federal law is a part of the legal landscape which creates a bidder's legitimate entitlements in the public competitive bidding process. And under any application of federal statutory and constitutional law, such a discriminatory requirement in subcontracting is unconstitutional, illegal and unenforceable.

The decision of the Supreme Court of Ohio creates legal confusion, uncertainty and unpredictability in

the economic realm of public bidding. Companies such as Cleveland, whose economic lifeblood is made up, to a large degree, of governmental contracts, depend upon the norms and entitlements established by the law governing the economic relationship between bidder and government. The Supreme Court of Ohio's decision destroys any ability of a bidder like Cleveland to rely upon substantive restrictions in local competitive bidding laws which do create a legitimate entitlement, as well as the ability to rely upon the legal norms set against racial discrimination in contracting, such as the one embodied in 42 U.S.C. § 1981. It should be corrected by this Court.

C. Even if Cleveland had no "Right" to or Property Interest in the Drywall Contract, the City could not deny the Contract to Cleveland to Implement an Unconstitutional Requirement or to Achieve an Unconstitutional Objective.

It was a violation of due process for the City to deprive Cleveland of the drywall contract, even if Cleveland had no property interest in the contract, if it was done in order to apply the unconstitutional racially discriminatory subcontracting requirement of the City's SBE program. In *Perry v. Sindermann*, this Court stated:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may

> not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.[67]

The reasoning of *Perry* should apply with equal force to the attempt of the City to deny Cleveland the drywall contract for the reason that Cleveland failed to meet the racially discriminatory subcontracting requirements of the City's SBE program which violate the Equal Protection Clause of the Fourteenth Amendment. The City has defended the equal protection part of this case by asserting it does not require bidders to meet any particular hard and fast racial "quota" in order to be awarded a contract, and argues that it only awards contracts on the basis of a bidder's attainment of the "small business" percentage goals. The trial court believed this a reason to find that Cleveland had not proved that the equal protection violations were the cause of Cleveland's denial of the contract, and ruled in favor of the City on the issue of

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[67] *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

causation on Cleveland's equal protection claim.[68] The Ohio First District Court of Appeals disagreed and reversed the trial court, holding that the issue of causation with regard to Cleveland's Equal Protection claims was for the jury to determine.[69] The Supreme Court of Ohio did not review the decision of the Ohio First District Court of Appeals as to Cleveland's equal protection claims. But in fact, the City's imposition of a requirement that Cleveland racially discriminate in its selection of small business subcontractors is a separate and independent basis for this Court to find a violation of the Due Process Clause of the Fourteenth Amendment.

Just as the government cannot terminate an untenured public employee's employment for lawful exercise of that employee's freedom of speech, the City cannot reject Cleveland's bid for failure to meet the racially discriminatory requirements of its unconstitutional specifications in its invitation to bid, regardless of whether Cleveland's interest in the contract rises to the level of a property interest. The City's argument that it does not award contracts on the basis of race after it has already required the bidders to engage in a "good faith effort" to do so is fatally flawed and should be quickly rejected. It is tantamount to the argument that racial "goals" are acceptable in lieu of mandatory racial "quotas." This Court has made it abundantly clear that all racial

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[68] App. 85a-88a.

[69] App. 45a-50a.

classifications are subject to strict scrutiny.[70] The City did not even engage in the pretense of arguing below that it had a basis of any sort to justify its use of racial preferences. The City cannot plausibly argue that the requirement for bidders to subcontract to small businesses is somehow separate from its requirement that a bidder racially discriminate in its selection of those same small businesses.

The Supreme Court of Ohio's determination that Cleveland could be legitimately rejected as a bidder on the basis of failing to meet the specifications of the invitation to bid by failing to meet the subcontracting requirement of the SBE program is the legal equivalent of allowing the City to disqualify Cleveland as a bidder because it did not comply with the City's unconstitutional SBE program. That is in itself a violation of Cleveland's due process rights.

CONCLUSION

The decision of the Supreme Court of Ohio adopted and applied incorrect constitutional principles to decide Cleveland's constitutional due process challenge brought pursuant to 42 U.S.C. § 1983, and conflicts with this Court's decisions, as well as relevant decisions by the Sixth Circuit Court of Appeals. The Supreme Court of Ohio adopted a state law "abuse of discretion" standard to determine whether Cleveland had a legitimate entitlement to the award of the drywall contract, and found hypothetical discretion which could only have existed under circumstances

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[70] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 212 (1995).

which did not occur (a rejection of bids or a rebid). In so doing, the Supreme Court of Ohio ignored the one substantive restriction on the City's discretion in its competitive bidding scheme which was relevant for purposes of the constitutional property law analysis and reached an incorrect result. Furthermore, the Supreme Court of Ohio ignored the unconstitutional nature of the requirement imposed upon Cleveland by the City, a requirement which violated the Equal Protection Clause of the Fourteenth Amendment. Instead, the Supreme Court of Ohio found Cleveland's failure to meet that unconstitutional requirement, and the rejection of its bid on that basis, the "proper exercise of discretion" by which the City prevented Cleveland from having any property interest protected by due process. This Court should issue a writ of certiorari to the Supreme Court of Ohio to review and correct the decision in this case. Doing so will bring clarity to the constitutional principles determining when a bidder on a government contract has a property interest protected by the Due Process Clause of the Fourteenth Amendment, and will promote predictability and stability in the economic realm of competitive public bidding.

Respectfully submitted,

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